

NO. 80359-5

WASHINGTON STATE SUPREME COURT

CERTIFICATION FROM
THE UNITED STATES DISTRICT COURT,
FOR THE WESTERN DISTRICT OF WASHINGTON

IN

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Plaintiff,

vs.

ONVIA, INC., ONVIA.COM, and RESPONSIVE MANAGEMENT
SYSTEMS, in its individual capacity and as class representative of a
purported settlement class,

Defendants.

FILED
COURT OF APPEALS DIV. 1
STATE OF WASHINGTON
2008 JAN -7 AM 10:11

Appellee-Defendant Responsive Management Systems'
Submission of Supplemental Authority

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Defendant Responsive Management Systems ("RMS") submits as supplemental authority the attached decision of the 9th Circuit Court, entitled *Goodstein v. Continental Casualty Co.*, __ F.3d __, 2007 WL 4225803 (9th Cir. Dec. 3, 2007), which addresses Washington law.

Respectfully submitted this 4th day of January, 2008.

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PROOF OF SERVICE

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(Cite as: - F.3d --)

C
Goodstein v. Continental Cas. Co.
C.A.9 (Wash_),2007_
Only the Westlaw citation is currently available.
United States Court of Appeals,Ninth Circuit
Robert I. GOODSTEIN, as court-appointed
receiver for Stemco Industrial Properties
Partnership and Stemo Renton Center Partnership,
Plaintiff-Appellant,
v_
CONTINENTAL CASUALTY COMPANY,
Defendant,
andIndustrial Indemnity Company; Industrial
Indemnity Co. of the Northwest, also known as
Fremont Industrial Indemnity; United States Fire
Insurance Company; John Doe, 1-20; Zelman
Renton LLC, Defendants-Appellees.
No. 05-35805.

Argued and Submitted March 6, 2007_
Filed Dec. 3, 2007.

Background: Receiver brought diversity action seeking declaratory judgment that insurer owed duty to indemnify and defend under comprehensive general liability (CGL) insurance policy and damages for breach of both duties. The United States District Court for the Western District of Washington, Marsha J. Pechman, J., granted summary judgment for insurer. Receiver appealed.

Holdings: The Court of Appeals, Berzon, Circuit Judge, held that:

- (1) receiver did not prove existence of enforceable contract;
- (2) difference between sale price received for polluted real property and fair market value of property had it been cleaned up prior to sale was not covered loss for which insured could have been **indemnified**;

- (3) environmental cleanup costs incurred by insured constituted "damages";
- (4) diminution in value of real property due to pollution did not alone constitute "property damage"
- (5) diminution in value of real property due to pollution did not fall within realm of "damages";
- (6) duty of insurer to defend was implicated by Washington State Department of Ecology action in declaring properties of insured polluted;
- (7) insurer was not relieved of duty to defend on basis that insured ultimately did not pay any response costs; and
- (8) insurer's duty to defend terminated upon sale of properties.

Affirmed in part, reversed in part, and remanded.

[1j Environmental Law 149E €137

149E Environmental Law
149EIX Hazardous Waste or Materials
149Ek436 Response and Cleanup; Liability
149Ek437 k. In General. Most Cited Cases
The Model Toxics Control Act of_ Washington is designed to deal both with the remediation of former environmental hazards and to prevent environmental hazards in the future. West's RCWA **70.105D.040.**

12j Environmental Law 149E €445(I)

149E Environmental Law
149EIX Hazardous Waste or Materials
149Ek436 Response and Cleanup; Liability
149Ek445 Persons Responsible

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149Ek445(I) k. In General. Most Cited

Cases

A past or present property owner is strictly liable under the Model Toxics Control Act of Washington for the remediation of environmental hazards caused by hazardous substances it released on its property. West's RCWA 70.105D.040.

[31 Contracts 95 X28(3)

95 Contracts

951 Requisites and Validity

951(B) Parties, Proposals, and Acceptance

95k28 Evidence of Agreement

95k28(3) k. Weight and Sufficiency.

Most Cited Cases

Contracts 95 90

95 Contracts

951 Requisites and Validity

951(D) Consideration

95k87 Evidence as to Consideration or Failure Thereof

95k90 k. Weight and Sufficiency. Most Cited Cases

Proponent did not prove existence of enforceable contract under Washington law, where proponent did not disclose any pertinent details of purported contract, including what consideration supported parties' agreement. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.; Restatement (Second) of Contracts § 26.

141 Contracts 95 9(1)

95 Contracts

951 Requisites and Validity

951(A) Nature and Essentials in General

95k9 Certainty as to Subject-Matter

95k9(I) k. In General. Most Cited

Cases

Contracts 95 X47

95 Contracts

951 Requisites and Validity

951(D) Consideration

95k47 k. Necessity in General. Most Cited

Cases

For an agreement to be enforceable under Washington law, the terms assented to must be sufficiently definite and the contract must be supported by consideration.

151 Contracts 95 9(1)

95 Contracts

951 Requisites and Validity

951(A) Nature and Essentials in General

95k9 Certainty as to Subject-Matter

95k9(1) k. In General. Most Cited

Cases

Testimony attesting to the existence of an verbal agreement must describe the essential terms of the agreement before a Washington court will enforce the agreement.

[61 Federal Courts 170B X829

170B Federal Courts

170B VIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)4 Discretion of Lower Court

170Bk829 k. Amendment, Vacation, or Relief from Judgment. Most Cited Cases

A district court's denial of a motion for reconsideration is reviewed for an abuse of discretion.

171 Insurance 217 2269

217 Insurance

217XVII Coverage-Liability Insurance

217XVII(A) In General

217k2267 Insurer's Duty to Indemnify in General

217k2269 k. Insured's Liability for Damages. Most Cited Cases

Difference between sale price received for polluted real property and fair market value of property had it been cleaned up prior to sale was not covered loss for which insured could have been indemnified under comprehensive general liability (CGL) insurance policy, since insured did not procure clean-up services himself and insured did not require buyer to promptly remediate pollution as

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condition of sale.

[8] Insurance 217 X2269

217 Insurance
217XVII Coverage-Liability Insurance
217XVII(A) In General
217k2267 Insurer's Duty to Indemnify in General
217k2269 k. Insured's Liability for Damages. Most Cited Cases
Environmental cleanup costs incurred by insured constituted "damages" under comprehensive general liability (CGL) insurance policy in Washington which covered liability to third-parties.

[9j] Insurance 217 X2277

217 Insurance
217XVII Coverage-Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2277 k. Property Damage. Most Cited Cases
Diminution in value of real property due to pollution did not alone constitute "property damage" under comprehensive general liability (CGL) insurance policy in Washington, where language of policy required "physical injury to tangible property.

[10] Insurance 217 X2269

217 Insurance
217XVII Coverage-Liability Insurance
217XVII(A) In General
217k2267 Insurer's Duty to Indemnify in General
217k2269 k. Insured's Liability for Damages. Most Cited Cases
Diminution in value of real property due to pollution did not fall within realm of "damages" under provision of comprehensive general liability (CGL) insurance policy in Washington which stated that "insured shall become legally obligated to pay" because of "property damage"; although such "damages" included response costs incurred by insured in cooperation with environmental agency,

diminution in property value was not included as surrogate for response costs which had not been incurred and where neither insured nor purchaser had been required to expend any money on remediation.

[11J] Insurance 217 e'2913

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2913 k. In General; Standard. Most Cited Cases
In Washington, the duty to defend does not arise for claims which are clearly not covered by the insurance policy.

112J Insurance 217 X2914

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 k. Pleadings. Most Cited Cases
In Washington, an insurer has a duty to defend whenever the insurance policy conceivably covers the allegations.

[13] Insurance 217 X2918

217 Insurance
217XXIII Duty to Defend
217k2916 Commencement of Duty; Conditions Precedent
217k2918 k. Claim, Suit, or Demand for Damages. Most Cited Cases
Washington State Department of Ecology action in declaring properties of insured polluted implicated duty of insurer to defend under comprehensive general liability (CGL) insurance policy in Washington, since environmental response costs constituted covered "damages" under CGL policy.

114j Insurance 217 x'2911

217 Insurance
217XXIII Duty to Defend
217k2911 k. In General; Nature and Source of Duty. Most Cited Cases

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Insurance 217 0=2918

217 Insurance
217XXIII Duty to Defend
217k2916 Commencement of Duty;
Conditions Precedent
217k2918 k. Claim, Suit, or Demand for
Damages. Most Cited Cases

Insurance 217 0=2930

217 Insurance
217XXIII Duty to Defend
217k2930 k. Termination of Duty;
Withdrawal. Most Cited Cases
Insurer was not relieved of duty to defend under
Washington law on basis that insured ultimately did
not pay any response costs after Washington State
Department of Ecology declared properties of
insured polluted, since duty to defend and duty to
indemnify were separate obligations.

[15j] Insurance 217 0'2911

217 Insurance
217XXIII Duty to Defend
217k2911 k. In General; Nature and Source
of Duty. Most Cited Cases
Under Washington law, the duty to defend and the
duty to indemnify are separate obligations and
should be examined independently.

[16] Insurance 217 0'2930

217 Insurance
217XXIII Duty to Defend
217k2930 k. Termination of Duty;
Withdrawal Most Cited Cases
Insurer's duty to defend under comprehensive
general liability (CGL) insurance policy, which
began at time of Washington State Department of
Ecology action in declaring properties of insured
polluted, terminated upon sale of properties; once
properties were sold without any remediation
performed, response costs, which may have been
covered under policy, were converted into
economic loss that clearly fell outside scope of
coverage.

[171 Insurance 217 0=2919

217 Insurance
217XXIII Duty to Defend
217k2916 Commencement of Duty;
Conditions Precedent
217k2919 k. Tender or Other Notice_
Most Cited Cases

Insurer was not informed that its participation was
desired in any investigation, negotiation, or defense
regarding extent of insured's liability for pollution
of insured real property, and thus duty to defend
under Washington law was not triggered under
comprehensive general liability (CGL) insurance
policy, under letter informing insurer that
Washington State Department of Ecology had
declared property polluted and which also stated, "
[p]lease note, however, in case there is any
confusion, we are not presently making any claims
under the policies"; rather, any intent to invoke
coverage under policy was specifically disclaimed.

[181 Insurance 217 0'2919

217 Insurance
217XXIII Duty to Defend
217k2916 Commencement of Duty;
Conditions Precedent
217k2919 k. Tender or Other Notice.
Most Cited Cases
To invoke the duty to defend under Washington
law, the insured must affirmatively inform the
insurer that its participation is desired.

119J Insurance 217 0'3212

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(B) Claim Procedures
217XXVII(B)3 Cooperation
217k3210 Effect of Failure to
Cooperate
217k3212 k. Prejudice to Insurer.
Most Cited Cases

Insurance 217 0'3367

217 Insurance

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217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3366 Settlement by Insured;
Insured's Release of Tort-Feasor
217k3367 k. In General. Most Cited
Cases

Washington law requires proof of *prejudice* where the insurer asserts as a defense to liability that the insured breached the policy's cooperation clause, which precludes coverage where the insured litigates or settled a lawsuit without involving the insurer.

120] Insurance 217 ~~€~~219

217 Insurance
217XXIII Duty to Defend
217k2916 Commencement of Duty;
Conditions Precedent
217k2919 k. Tender or Other Notice.
Most Cited Cases

An insurer remains liable under Washington law for the breach of the duty to defend absent proof of actual and substantial prejudice even if the insured does not affirmatively inform the insurer that a defense is desired.

121] Insurance 217 ~~€~~219

217 Insurance
217XXIII Duty to Defend
217k2916 Commencement of Duty;
Conditions Precedent
217k2919 k. Tender or Other Notice.
Most Cited Cases

Insurer was not relieved of its obligation under Washington law to prove that it was prejudiced by lack of tender of defense request to it before lawsuit was filed claiming that insurer breached duty to defend under comprehensive general liability (CGL) insurance policy; filing of lawsuit itself constituted request for payment of defense costs under policy, and at that point, late notice rule applied.

122] Insurance 217 ~~€~~234(2)

217 Insurance

217XXIII Duty to Defend
217k2932 Effect of Breach
217k2934 Amounts Recoverable from
Insurer
217k2934(2) k. Underlying Defense
Costs. Most Cited Cases

Insurance 217 ~~€~~234(3)

217 Insurance
217XXIII Duty to Defend
217k2932 Effect of Breach
217k2934 Amounts Recoverable from
Insurer
217k2934(3) k. Underlying Judgment;
Other Losses. Most Cited Cases

In Washington, the measure of damages for a good faith, but unjustified breach of the duty to defend is the costs and reasonable attorney fees incurred by the insured in defending itself plus consequential damages that the insured incurred as a result of the breach.

123j Insurance 217 ~~€~~234(3)

217 Insurance
217XXIII Duty to Defend
217k2932 Effect of Breach
217k2934 Amounts Recoverable from
Insurer
217k2934(3) k. Underlying Judgment;
Other Losses. Most Cited Cases

Insured could not recover amount by which property value was depressed due to its polluted state as damages under comprehensive general liability (CGL) insurance policy even if insurer breached duty to defend, since breach was not in bad faith and such damages were not caused by failure to defend.

124j Insurance 217 ~~€~~270(1)

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2267 Insurer's Duty to Indemnify in
General
217k2270 Defense Costs,

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Supplementary Payments and Related Expenses
217k2270(I) k. In General. Most Cited Cases

An insurance company is liable for defense costs under Washington law absent evidence of substantial prejudice even if a claim for defense costs is never made until after the lawsuit is settled and even if that claim is asserted in the form of a coverage suit rather than by a letter to the insurer demanding a defense or submitting defense costs.

125J **Insurance** 217 X2934(3)

217 Insurance
217XXIII Duty to Defend
217k2932 Effect of Breach
217k2934 Amounts Recoverable from Insurer

217k2934(3) k. Underlying Judgment; Other Losses. Most Cited Cases
Insured could recover costs incurred prior to sale of insured real property in defending against Washington State Department of Ecology action which declared that property polluted, including costs incurred in investigating environmental contamination, such as hiring expert to assess pollution, on successful Washington claim of breach of duty to defend under comprehensive general liability (CGL) insurance policy.

[26J Insurance 217 ~~€~~2919

217 Insurance
217XXIII Duty to Defend
217k2916 Commencement of Duty; Conditions Precedent
217k2919 k. Tender or Other Notice.

Most Cited Cases
The existence of prejudice is a question of fact, under Washington's late notice rule, which provides that an insurer must affirmatively prove that the insured's delay in tendering the defense claim caused the insurer "actual and substantial prejudice" to avoid liability for defense costs.

127I **Insurance** 217 x2919

217 Insurance

217XXIII Duty to Defend
217k2916 Commencement of Duty; Conditions Precedent
217k2919 k_ Tender or Other Notice.

Most Cited Cases
To establish prejudice under Washington's late notice rule, which provides that an insurer must affirmatively prove that the insured's delay in tendering the defense claim caused the insurer "actual and substantial prejudice" to avoid liability for defense costs, evidence of concrete detriment resulting from delay is required, together with some specific harm to the insurer caused thereby, and speculation is rejected.

128J Insurance 217 ~~€~~2919

217 Insurance
217XXIII Duty to Defend
217k2916 Commencement of Duty; Conditions Precedent
217k2919 k. Tender pr Other Notice.

Most Cited Cases
Insurer had to show that it could have taken steps to mitigate or dispute insured's liability for pollution of insured real property, or that it was otherwise damaged by late notice of claim, to show under Washington's late notice rule that it was prejudiced as matter of law, and thus relieved of liability under comprehensive general liability (CGL) insurance policy on breach of duty to defend claim.

William F. Cronin, Corr Cronin Michelson Baumgardner & Preece LLP, and Colleen A. Christensen, The Christensen Finn, Seattle, WA, for the appellant.
David M. Schoeggl, Mills Meyers Swartling, Seattle, WA, for the appellees.

Appeal from the United States District Court for the Western District of Washington; Marsha J. Pechman, District Judge, Presiding. D.C. No. CV-02-01669-MJP.

Before DIARMUID F. O'SCANNLAIN, A. WALLACE TASHIMA, and MARSHA S. BERZON, Circuit Judges.

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OPINION

BERZON, Circuit Judge:

*1 At the heart of this insurance coverage dispute lie two properties, identified as contaminated by the State of Washington, that were sold in their polluted state rather than remediated. After the sale, Appellant Robert I. Goodstein, as receiver, tendered a \$53 million claim to Appellee Industrial Indemnity Co. ("Industrial") under a comprehensive general liability ("CGL") policy, reflecting the difference between "the appraised value of the sites if uncontaminated less the sales price of the sites in their contaminated states." Industrial refused to pay, and Goodstein consequently brought this lawsuit, ^{R'} seeking a declaration that Industrial owed a duty to indemnify and defend Goodstein under the policy and damages for breach of both duties. The district court granted summary judgment for Industrial on all claims, and Goodstein timely appealed.

We affirm the district court's holding that Goodstein's claim for the diminution in the sale value of the properties due to pollution was not covered under Industrial's policy, but reverse the district court's conclusion that Industrial is as a matter of law not liable for breaching its duty to defend Goodstein.

I.

A. The Properties

[1][2] Members of the Sternoff family jointly owned, through partnerships, two industrial properties in Washington (collectively, "the properties")-one on Marginal Way in Seattle ("the Marginal property") and the other in Renton ("the Renton property"). At the Marginal property, the Sternoffs operated for 45 years a scrap metal salvage yard that caused ground pollution. At the Renton site, the Sternoffs recycled scrap metal and electrical equipment for approximately 20 years, resulting in hazardous waste byproducts containing high concentrations of soluble lead. The properties were identified by the Washington State

Department of Ecology ("DOE") as environmentally contaminated in the late 1980s and early 1990s and were listed as hazardous sites under the Model Toxics Control Act of Washington ^{N2}

Starting in the mid-1980s, the Stemoff partners had a series of disagreements among themselves that resulted in litigation. On March 29, 1990, the King County Superior Court dissolved the partnerships and appointed Robert Goodstein as receiver to wind them up. The court indicated that Goodstein "may proceed with remediation of contaminated properties as necessary but may also consider sale without remediation."

Recognizing the Sternoffs' liability for remediating the polluted properties under state and federal law, ^{FN3} Goodstein presented two options to the receivership court: (1) sell the properties "as is," with a discounted sales price accounting for the pollution, or (2) remediate the pollution and then sell the properties. The court approved of a plan to sell the two properties "as is."

In 1996 and 1998, respectively, the Receiver sold the Renton and Marginal properties. The Marginal property sold for \$500,000 and the Renton property for \$3,001,000. The sales agreements for both properties disclosed that the lands were polluted and required the purchasers to take over responsibility for any cleanup the government-or the practicalities of the real estate market-might in the future demand. The agreements did not, however, commit the purchasers to remediate the properties on their own. Both agreements also provided that "[n]o amendment, change or modification of [the agreements] shall be valid, unless in writing and signed by the parties hereto."

B. The Insurance Policies

*2 Industrial issued primary and excess insurance policies to the Sternoffs between 1980 and 1986. In relevant part, the policies ^{FN4} provide: "[Industrial] will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of [property

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damage)...." Under the policies, Industrial also assumed "the right and duty to defend any suit against the insured seeking damages on account of such ... property damage, even if any of the allegations of the suit are groundless, false or fraudulent; and may make such investigation and settlement of any claim or suit as it deems expedient. ..." The policies do not define "damages," "claim," or "suit" "Occurrence" is defined to mean "an accident, including continuous or repeated exposure to conditions, which results in ... property damage neither expected nor intended from the standpoint of the insured[.]"

In a provision entitled "Insured's Duties in the Event of Occurrence, Claim or Suit," the policies required the Sternoffs to provide written notice of an "occurrence" to Industrial "as soon as practicable," and, in the event a claim or suit is asserted against the Sternoffs, to "immediately forward" to Industrial all "demand, notice, summons or other process" received by the Sternoffs. In the same provision, the Sternoffs agreed not to "voluntarily make any payment, assume any obligation or incur any expense" related to any such claim.

C. Communication Between the Receiver and Industrial

1. Pre-Sale Communication

On September 28, 1990, Goodstein wrote to Industrial, indicating that the Washington DOE had identified the Marginal and Renton sites as contaminated and stating that Goodstein had initiated a study to assess the damage and cost of cleaning up the land. The letter also stated: "We write to notify you that Stemoff *may make a claim* for cleanup and related costs under the insurance policies you issued in favor of Stemoff" (Emphasis added). Copies of the relevant policies were requested, and in closing, the letter stated, "After we have had an opportunity to review the policies, we *may* make a more formal claim for coverage of the cleanup costs." (Emphasis added).

Internal documents indicate that Industrial understood the September 28, 1990 letter to be asserting a claim for the cleanup and other related costs. Industrial wrote a letter to Goodstein on October 19, 1990 "acknowled[ing] receipt of the captioned claim," and indicating that it was attempting to find the Sternoffs' policies, as requested.

In a reply letter dated October 22, 1990, Goodstein acknowledged receipt of Industrial's October 19, 1990 letter, but stated: "Please note, however, in case there is any confusion, *we are not presently making any claims under the policies* At present, we are simply asking to obtain copies of any policies, applications, etc. relating to insurance **provided** by Industrial Indemnity to Stemoff" (Emphasis added). Industrial heard nothing more about the Stemoff policies thereafter, and in December 1992 closed the file for lack of activity. Before the file was closed, a summary of what was known regarding a possible claim, and a list of possible defenses, was prepared. The summary document indicated that no coverage position letter had been issued because no claim had been filed.

2. PostSale Communication

*3 On September 25, 1998, eight years after Goodstein told Industrial that he was "not presently making any claims" under the Stemoff policies, Goodstein sent a letter to Industrial indicating that the Renton and Marginal properties had been sold. Goodstein stated:

Previous correspondence on my behalf had notified .. Industrial Indemnity, as an insurer of Stemoff, of potential claims arising out of the environmental contamination of properties owned and/or operated by Stemoff. The extent of the contamination has now been more fully investigated, and the properties have now been sold. I am, therefore, now in a position to fully present and settle the environmental claims related to those properties.

In that letter, Goodstein also stated: I hereby demand payment of \$473,000 for the loss on the Marginal Way property, and \$4.839 million for the loss on

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the Renton properties. These amounts are calculated based on the appraised value of the sites if uncontaminated less the sales price of the sites in their contaminated condition.

Industrial responded a month later with a letter disclaiming any coverage for the losses claimed by Goodstein on behalf of the Sternoffs.

D. *Procedural History*

Four years later, in 2002, Goodstein filed this lawsuit. The second amended complaint-the operative pleading for the purposes of this appeal-sought, in relevant part, a declaratory judgment that Industrial owed a duty to defend and to indemnify Goodstein under the CGL policies and asserted a claim for breach of contract based on Industrial's failure to fulfill those duties.

Industrial thereafter moved for summary judgment on the grounds that Goodstein's claimed losses due to the allegedly reduced proceeds ^{FN5} from the property sales were not covered by the policies and that Goodstein had never invoked the duty to defend.

In opposing the summary judgment motion, Goodstein offered evidence that he and the purchaser of the Renton property, Zelman Renton LLC ("Zelman"), had entered into an oral agreement "to ensure that all rights to insurance coverage for environmental damage at the Renton site are consolidated and assigned to the Receiver." Specifically, the declaration stated that "the Receiver and Zelman have agreed that: 1) all rights the Receiver had to insurance coverage for environmental contamination will be transferred to Zelman; and 2) Zelman will transfer all rights it has to insurance coverage back to the Receiver." The declaration attesting to the cross-assignment indicated that "[t]he agreement has not yet been finalized." No such agreement evidencing the transfer and cross-transfer was submitted in support of Goodstein's opposition to summary judgment.

The district court granted Industrial's summary

judgment motion on July 11, 2005, finding that Industrial had neither a duty to defend nor a duty to indemnify Goodstein under the policies. In rendering its decision, the court did not consider the evidence purporting to establish a cross-assignment.

*4 Goodstein thereafter filed a motion for reconsideration, this time supported by a new declaration that stated that "all the material terms [of the cross-assignment agreement] had been negotiated by, agreed to, and known to the parties as of January 27, 2005." A written cross-assignment agreement was also submitted as evidence. The district court denied the motion for reconsideration on August 5, 2005, holding that Goodstein failed to comply with the local rules governing such motions.

Goodstein timely filed the instant appeal. On appeal, Goodstein challenges the district court's failure to consider the cross-assignment evidence at the summary judgment and reconsideration stages, as well as the district court's grant of summary judgment for Industrial on Goodstein's duty to indemnify and duty to defend claims.¹⁶

II.

[3] Before proceeding to evaluate the merits of the district court's summary judgment order, we first address whether the court erred in (1) refusing to consider Goodstein's cross-assignment evidence submitted in opposition to the summary judgment motion, and (2) denying Goodstein's motion for reconsideration predicated on additional evidence of the cross-assignment.

Goodstein asserts that it offered evidence that Zelman, who purchased the Renton property, entered into an agreement with Goodstein "in principle to cross-assign rights to insurance coverage, such that all of the rights [Goodstein] had were transferred to Zelman and all of the rights that Zelman had were then transferred back to [Goodstein]." In so doing, Goodstein argues, the agreement "created an indisputable damages claim, since Zelman paid the costs to remediate the Renton property." Because we hold that the district court

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properly declined to consider the cross-assignment evidence at summary judgment and properly refused to reconsider that decision, we do not address the possible impact of the alleged cross-assignment on Goodstein's substantive claims.

A. Cross-Assignment Evidence at Summary Judgment Stage

The district court did not abuse its discretion by declining to consider the cross-assignment evidence submitted at the summary judgment stage. See *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir.2002) (reviewing trial court's refusal to consider inadmissible evidence at summary judgment under abuse of discretion standard). Goodstein argues that he had reached an oral agreement concerning the assignments, and that the declaration properly served as evidence of its existence. He asserts that "testimony of an agreement is adequate to prove its existence," and that oral agreements are enforceable if they set forth all material terms of the agreement and provide that the parties will later memorialize the agreement.

The evidence Goodstein submitted in opposition to summary judgment, however, indicates that no definitive agreement had actually been reached: "The Receiver has reached an agreement *in principle* with Zelman.... The agreement *has not yet been finalized*" (Emphasis added). So, contrary to Goodstein's assertion, the declaration did not state that the parties had already agreed to the final terms but would memorialize them later. Cf. Restatement (Second) of Contracts § 26. Moreover, the sales agreement executed by Zelman and Goodstein, which the cross-assignment purported to modify, made clear that only written, signed agreements could supersede or amend the original sales agreement.

*5 [4][5] Given these circumstances, the evidence submitted in opposition to summary judgment is insufficient to prove the existence of an enforceable contract under Washington law.^{NB} For an agreement to be enforceable, "the terms assented to must be sufficiently definite, [and] the contract must

be supported by consideration." *Keystone Land & Dep. Co. v. Xerox Corp.*, 152 Wash.2d 171, 94 P.3d 945, 949 (Wash.2004) (citation omitted). Moreover, testimony attesting to the existence of an oral contract must describe the "essential terms" of the agreement. See *Hansen v. Transworld Wireless TV-Spokane, Inc.*, 111 Wash.App. 361, 44 P.3d 929, 938 (Wash.Ct.App.2002). The declaration submitted by Goodstein discloses no pertinent details of the purported cross-assignment, including what consideration supported the parties' agreement.

Because the purported agreement was admittedly not final, not in writing, despite the requirement in the original contract, and the evidence failed to sufficiently detail its terms, the district court did not abuse its discretion in declining to consider the cross-assignment evidence.

B. Cross-Assignment Evidence at Reconsideration Stage

[6] The district court also properly declined to reverse its summary judgment ruling on the basis of evidence submitted in support of Goodstein's motion for reconsideration. "We review a district court's denial of a motion for reconsideration for an abuse of discretion." *M2 Software, Inc. v. Madacy Entmt.*, 421 F.3d 1073, 1086 (9th Cir.2005).

The district court refused to reconsider the cross-assignment issue because Goodstein failed to meet the standard for such motions laid out in the local rules. The Western District of Washington Local Rules provide that motions for reconsideration are disfavored, and will be granted only upon, in pertinent part, "a showing of new facts ... which could not have been brought to [the court's] attention earlier with reasonable diligence." W_D_Wash. Local R. 7(h).

Goodstein's new evidence indicated that, "[w]hile the agreement was not memorialized to [sic] writing by the time" the original declaration in opposition to summary judgment was submitted, "all the material terms had been negotiated by, agreed to, and known to the parties as of January 27, 2005." Yet, the declaration submitted in January in

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opposition to summary judgment did not recite the terms contained in the written document dated more than seven months later and submitted in support of reconsideration. Because those terms were, according to Goodstein, fully settled at the time the opposition to summary judgment was filed in January, the July submission on reconsideration fails of its own weight: According to that submission, the precise terms of the cross-assignment agreement *could* have been brought to the district court's attention in January, as they were "negotiated, agreed to, and known to the parties" by then. Goodstein's motion for reconsideration therefore did not meet the burden imposed by the Local Rules. W.D. Wash. Local it. 7(h); *see also Shalit v. Coppe*, 182 Fad 1124, 1132 (9th Cir.1999) ("[R]econsideration is appropriate only in very limited circumstances, and ... the overwhelming weight of authority is that the failure to file documents in an original motion or opposition does not turn the late filed documents into newly discovered evidence."(alteration and internal quotation marks omitted)).

*6 Accordingly, we conclude the district court did not abuse its discretion in excluding the cross-assignment evidence at summary judgment and in denying Goodstein's motion for reconsideration. We therefore need not consider the possible impact of the alleged cross-assignment of rights on Goodstein's substantive claims for coverage under Industrial's CGL policy. We turn to those claims next.

[7] Goodstein challenges the district court's conclusion that Industrial had no duty to indemnify the receiver for the difference between the sale price received for the polluted properties and the fair market value of the land had it been cleaned up prior to sale. We agree that the policy does not provide for such indemnity. We cannot, however, adopt the rationale asserted by the district court, as Industrial urges.

In finding that Industrial had no indemnification

duty under the policy, the district court first emphasized that Washington adheres to a strict distinction between third and first party insurance. *See Olds-Olympic*, 918 P.2d at 930 (Wash.1996). Given the fact that Industrial's policy was designed to protect third party harm, the district court reasoned, the policy provision obligating Industrial to pay " 'on behalf of the insured,' rather than to the insured" must be read literally, to provide only for "indemnify[ing] the insured for someone else's loss, not for the insured's own loss," and thus to preclude coverage for the decreased sale price.

[8] The Washington Supreme Court, however, has demonstrated a marked willingness to take a view of policy language in the context of insurance coverage for environmental cleanup claims sufficiently expansive to preclude such literalism. For example, in *Boeing Co. v. Aetna Casualty & Surety Co.*, 113 Wash.2d 869, 784 Pld 507 (Wash.1990), which concerned a CGL policy identical to the one at issue here, the Washington Supreme Court interpreted the policy to provide coverage beyond the literal scope of the policy's language. The specific question certified to the court in *Boeing* concerned whether environmental cleanup costs incurred by an insured constituted "damages" under a CGL policy. *Id.* at 516.In concluding that such costs are within the scope of CGL coverage, the court necessarily rejected the notion that the policy covers only sums paid to the third party damaged by the insured's actions. In other words, *Boeing* held remediation costs covered under a third-party liability policy even though the insurer was to pay the insured for costs incurred, rather than paying the party to whom the insured was actually "liable" for the property damage-i.e., the EPA and/or the Washington DOE. Yet, the literal language of the policy, as interpreted by the district court in this case, would appear to prohibit such coverage. Thus, Goodstein's claim cannot fail simply because it is not a request for a payment made to a harmed third party.

So recognizing, Goodstein argues that the claim for the diminution in value of the land due to the pollution should be covered because it is a functional approximation of the cost to remediate

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the properties, which Industrial would be liable to pay under *Boeing* and *Weyerhaeuser Co. v. Aetna Casualty & Surety Co.*, 123 Wash.2d 891, 874 P.2d 142 (Wash.1994). In support of this argument, Goodstein urges us not to confuse form and substance: "Washington courts have taken a more pragmatic approach and have refused to allow a forfeiture of coverage based on an insurer's superficial objections to the *form* that a claim takes, especially where the *substance* of the claim is identical to what the insurance covers," citing *Boeing*. But the instant land sale contracts do not amount to the functional equivalent of the claims in *Boeing* and *Weyerhaeuser* in one crucial respect: Neither contract required the buyer actually to remediate the pollution as a condition of sale. Because of that omission, this case is fundamentally different from the situation presented in both *Boeing* and *Weyerhaeuser*.

*7 The rationale for finding coverage in those two cases is that the third party injured by the insured's bad act is made whole through the insurer's payments for cleanup costs. The plaintiffs in *Boeing* and *Weyerhaeuser* actually cleaned up the polluted land, thus remedying the harm to the public caused by the contamination. The covered damages were incurred as part of that effort. As the court in *Boeing* explained, the CGL policies cover as "damages" an insured's obligation to pay environmental response costs because "the substance of the claim for response costs in the present case concerns compensation for restoration of contaminated water and real property." 784 P.2d at 515 (emphasis added). In this case, however, Goodstein would have Industrial compensate him when he has not taken any action to ensure—either by procuring clean up services himself or by requiring the buyer of the contaminated land to do so—that the harm caused by the Sternoffs' polluting activities has been or will be remedied. Indeed, the record indicates that while one of the properties was cleaned up by the purchaser, the other remains polluted almost ten years after the sale and over fifteen years after the government first identified the land as containing hazardous waste.

This holding does not elevate form over substance,

as Goodstein suggests. Rather, it draws a line consistent with Washington's expressed preference for encouraging prompt, voluntary remediation of pollution in the insurance coverage context.

The Washington Supreme Court articulated such a concern in *Weyerhaeuser*. *Weyerhaeuser* acknowledged that special considerations inform coverage disputes in the environmental claims context, because environmental statutes impose strict liability on polluters "in order to safeguard society in general." 874 P.2d at 152. The court then cited the concerns expressed by commentators and the DOE that precluding coverage of voluntary clean up costs under CGL policies would "create[a disincentive to engage in independent cleanups," and that, as a result, "the environment will suffer severe harm if owners have to postpone a cleanup until a clear third party claim prompts a lawsuit." Id at 151-52. *Weyerhaeuser's* discussion of these potential harms demonstrates a concern with encouraging prompt remediation of the harm caused to the public by pollution with a minimum of transaction costs to the government.

Echoing the Washington Supreme Court is the Insurance Commissioner, who articulated the state's basic position on environmental claims by declaring: It is in the public interest to reduce the costs incurred in connection with environmental claims and to expedite the resolution of such claims. The state of Washington has a substantial public interest in the timely, efficient, and appropriate resolution of environmental claims involving the liability of insureds at polluted sites in this state. This interest is based on practices favoring good faith and fair dealing in insurance matters and on the state's broader health and safety interest in a clean environment.

*8 Wash. Admin. Code 284-30-900(1).

In this case, Goodstein presumably did receive a significantly reduced price for the sale of the properties due to their pollution. We believe, however, that Washington courts would not find that loss covered under Industrial's policy, as Goodstein failed to ensure that the polluted

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properties would be cleaned up promptly. Again, the purchase agreements contained no cleanup condition. In economic terms, it is probable that the reduced purchase price represented a calculation premised on the probable cost of remediation as discounted by a factor representing the probability that the costs would actually be incurred and, if so, how far in the future. The reduction in price for the cleanup costs was thus almost surely not equivalent in amount to the present cost of prompt cleanup. And the purchaser retained the right, and had an incentive, to contest any specific government-imposed cleanup requirements, as well as to delay incurring cleanup costs as long as possible.

[9] Furthermore, the language of the policy supports our conclusion that Goodstein's claim for diminution in value cannot be covered under Industrial's policy. First, diminution in value does not alone constitute "property damage" where the policy language requires "physical injury to tangible property." FNhuln *Guelich v. American Protection Ins. Co.*, 54 Wash.App. 117, 772 P.2d 536 (Wash.Ct.App.1989), the issue was whether a homeowner's umbrella liability insurer had a duty to defend him in a view obstruction suit. The court held that diminution in property value resulting from an obstructed view does not constitute a "physical injury to tangible property" that would give rise to the duty to defend, because such diminution is not itself a physical injury, and a view is not tangible property at 538. Thus, it appears that under Washington law, diminution in property value would not be covered as property damage under the "physical injury" language of the Industrial general liability policy. See also *New Hampshire Ins. Co. v. Viera*, 930 F.2d 696, 701 (9th Cir.1991) ("[W]e are persuaded that diminution in value is not 'physical damage' to tangible property" under California law); *Auto-Owners Ins. Co. v. Carl Brazell Builders*, 356 S.C. 156, 588 S.E.2d 112, 116 (S.C.2003) ("Most courts hold the diminished value of tangible property does not constitute property damage within the meaning of CGL policies which define property damage as physical injury.").

[10] Nor can diminution in value fall within the

realm of "damages" that the "insured shall become legally obligated to pay" because of "property damage." While Washington courts have interpreted such "damages" to include response costs incurred by insureds in cooperation with an environmental agency, see *Weyerhaeuser*, 874 P.2d at 14S; *Boeing*, 784 P.2d at 515, they have never extended such interpretation to include diminution in property value as a surrogate for response costs never incurred. Here, there is no indication that the Stemoffs or Goodstein incurred any clean-up expenses or compensated an environmental agency for its response costs; indeed, they were "not required to expend any money...." *Block v. Golden Eagle Ins. Co.*, 121 CalApp.4th 186, 196, 17 Cal.Rptr.3d 13 (2004) (holding that diminution in property value does not constitute "damages" under a liability policy). Furthermore, Goodstein did not "constructively" expend any money for remediation, because the sale was not conditioned on remediation that the buyer would perform with the money saved from the reduced purchase price.¹³

*9 Accordingly, we affirm the district court's holding that Industrial had no obligation to indemnify Goodstein for the loss associated with the sale of the polluted properties under the policy.^{FN. "}

IV.

Goodstein also challenges the district court's grant of summary judgment for Industrial on the duty to defend claim.

A. Duty to Defend vs. Duty to Indemnify

[11][12][13] The district court held that Industrial had no duty to defend Goodstein because the policy clearly did not cover his claim for diminution in value damages. While it is true that the duty to defend does not arise for "claims which are clearly not covered by the policy," an insurer has a duty to defend whenever "the insurance policy conceivably covers the allegations." *Woo v. Fireman's Fund Ins. Co.*, 161 Wash.2d 43, 164

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P.3d 454, 459 (Wash.2007) (en banc) (quoting *Kirk v. Mt. Airy Ins. Co.*, 134 Wash.2d 558, 951 P.2d 1124 (Wash.1998) (en banc)) (emphasis added). According to Goodstein, the DOE's allegations of contamination created a duty to defend, because claims for environmental remediation are potentially covered under the Industrial policy.

As an initial matter, we note that whether DOE's actions in declaring the Stemoff properties polluted constituted a "suit" within the meaning of the policy is an open issue under Washington law. The Washington Supreme Court has repeatedly declined to resolve the issue. See *Olds-Olympic*, 918 P.2d at 928 n. 7 (observing that "[c]ase law from around the country ... is split on what constitutes a 'suit' for purposes of the duty to defend in environmental cleanup cases" and declining to resolve the issue); *Weyerhaeuser*, 874 P.2d at 148 (same). But Industrial has not argued in this court that the government's conduct related to the polluted properties did not constitute a "suit," so we do not endeavor to resolve the issue. Instead, we assume that the DOE designation of the property was a "suit." So assuming, the issue is whether Industrial would have been potentially liable for response costs under the policy. Because Washington courts agree that environmental response costs can constitute covered "damages" under CGL policies, see *Boeing*, 784 P.2d at 515, we are satisfied that the DOE action implicated Industrial's duty to defend.

[14][15][16] That Goodstein ultimately did not pay any response costs is irrelevant to whether a duty to defend existed while such response costs were potentially payable, because "[u]nder Washington law, the duty to defend and the duty to indemnify are separate obligations," *Dewitt Constr. v. Charter Oak Fire Ins. Co.*, 307 F.3d 1127, 1137 (9th Cir.2002), and "should be examined independently," *Weyerhaeuser*, 874 P.2d at 148. However, once Goodstein sold the properties without performing any remediation, he converted the response costs, which may have been covered under the policy, into an economic loss that clearly fell outside the scope of coverage. Hence, while the duty to defend began at the time of the DOE action, it terminated upon the sale of the properties. See *Overton v. Consol*

Ins. Co., 145 Wash.2d 417, 38 P.3d 322, 334 (Wash.2002) ("An insurer's duty to defend is a continuing one, and does not end until the underlying action is resolved or it is shown that *there is no potential for coverage.*") (emphasis added). We therefore analyze the duty to defend solely with respect to the time period from the DOE action up to the sale of the properties.

B. Invocation of the Duty to Defend

*10 [17J Industrial argues that we need not further concern ourselves with whether the duty to defend was breached, because Goodstein's claim that it was comes much too late. Given that the duty to defend can be breached without implicating the duty to indemnify, our analysis of the timing issue begins with when, if at all, Goodstein invoked the duty to defend in the first instance.

1. 1990 Letters

Goodstein asserts that he invoked the duty via the September 28, 1990 letter, which he claims gave Industrial notice of the fact that the DOE had declared the properties polluted.¹⁵ A review of the full record before us, however, makes clear that this position is untenable.

[18J Washington courts have rejected the notion that "a tender of defense is sufficient if the insured puts the insurer on notice of the claim." *Unigard Ins. Co. v. Leven*, 97 Wash.App. 417, 983 P.2d 1155, 1160 (Wash.Ct.App.1999). "[A]n insurer cannot be expected to anticipate when or if an insured will make a claim for coverage; the insured must affirmatively inform the insurer that its participation is desired." *Id.*; see also *Gruen v. Allstate Ins. Co.*, 108 Wash.App. 133, 29 P.3d 777, 782 (Wash.Ct.App.2001); *Time Oil Co. v. Cigna Prop. & Cas. Ins. Co.*, 743 F.Supp. 1400, 1420 (W.D.Wash.1990). Goodstein's October 22, 1990 letter went to great pains to inform Industrial that no claim had been made: "Please note, however, in case there is any confusion, *we are not presently making any claims under the policies.*" (Emphasis

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added). Far from informing Industrial that its participation was desired in any investigation, negotiation or defense regarding the extent of Goodstein's liability for the pollution, see *Unigard*, 29 Pad at 782, Goodstein specifically disclaimed any intent to invoke coverage under the policies. Goodstein cannot now claim Industrial's duty to defend arose as a result of that early correspondence.

2. Failure to Invoke the Duty

[19][20][21] Industrial's position is just as unpersuasive. Industrial asserts, as it also did in the district court, that it could not have breached the duty to defend because Goodstein never invoked that duty. Accordingly, Industrial argues, because the duty to defend never arose in the first place, Washington's late notice rule,^{FN, b} under which an insurer must prove that the insured's delay in tendering the defense claim caused the insurer "actual and substantial prejudice" to avoid liability for defense costs, does not apply.^{FN} "See *Mutual of Enumclaw Ins. Co v. USF Ins. Co.*, 137 Wash.App. 352, 153 P.3d 877, 882 (Wash.Ct.App.2007); see also *Pub. [Ail. Dist. No. I v. Intl Ins. Co.*, 124 Wash.2d 789, 881 P.2d 1020, 1029 (Wash.1994); *Gruen*, 29 P.3d at 782. Industrial's argument is creative, but it cannot fly. As an initial matter, Industrial cites no case law supporting the notion that there is a meaningful distinction between a late invocation of the duty to defend and a failure ever to invoke that duty.¹⁸ That is probably because, as a matter of both Washington law and of simple logic, it makes no sense to say that a duty to defend was never invoked when, as here, the insured has sued the insurer for a breach of the duty to defend. The filing of the lawsuit itself constitutes a request for payment of defense costs under the policy,^{FN19} and at that point, the late notice rule applies.

*11 The logic of a recent Washington Court of Appeals case illustrates the point by analogy. In *Mutual of Enumclaw*, 137 Wash.App. 352, 153 P.3d 877, the insured was sued for construction defects. The insured tendered indemnification and defense claims to two insurance companies

(collectively "Enumclaw"), but specifically decided not to tender the claims to a third ("USF").*Id.* at 879-80. Enumclaw then settled the lawsuit. *Id.* at 880. As part of the settlement, the insured assigned its rights under all other policies to Enumclaw. *Id.*

[22][23][24] Enumclaw later discovered the USF policy and sued USF for contribution. *Id.* The trial court granted summary judgment for USF, holding that USF was "excused from its duty to perform under its policy or to contribute to a settlement procured by a coinsurer," because the insured had affirmatively chosen not to tender the claim to USF. *Id.* The Washington Court of Appeals reversed, holding that Enumclaw, standing in the shoes of the insurer, could invoke the late tender rule through the instant lawsuit. *Id.* at 878, 881-82. Consequently, the court held, USF would be liable to contribute unless it could prove actual and substantial prejudice. *Id.* Enumclaw's logic dictates that even if a claim for defense costs is never made until after the lawsuit is settled, and even if that claim is asserted in the form of a coverage suit rather than by a letter to the insurer demanding a defense or submitting defense costs, the insurance company is still liable for the defense costs absent evidence of substantial prejudice. Accordingly, the fact that Goodstein may never have tendered a defense request to Industrial before filing this lawsuit^{FN20} does not relieve Industrial of its obligation to prove prejudice.

[25] If Goodstein can establish a breach of the duty to defend upon remand, consequently, he will be able at most to recover as damages any pre-transfer costs incurred in defending, including, for example, costs incurred in investigating the environmental contamination such as hiring an expert to assess the pollution. See *Unigard*, 983 P.2d at 1159 & n. 9; cf. *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wash.2d 751, 58 P.3d 276, 281 n. 5 (Wash.2002) ("An insurer may be responsible for defense costs prior to tender.").

3. Prejudice

[26][27][28] Industrial cannot establish prejudice as

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a matter of law on the record before us. The existence of prejudice is a question of fact, *Tran v. State Farm Fire & Cc's. Co.*, 136 Wash.2d 214, 961 P.2d 358, 365 (Wash.1998), as to which the insurer "has the affirmative burden of proof," *Pulse v. Nw. Farm Bureau Ins. Co.*, 18 Wash.App. 59, 566 P.2d 577, 579 (Wash.Ct.App.1977). To establish prejudice, Washington courts "reject speculation, and require evidence of concrete detriment resulting from delay, together with some specific harm to the insurer caused thereby." *Canron, Inc. v. Fed. Ins. Co.*, 82 Wash.App. 480, 918 P.2d 937, 941 (Wash.Ct.App.1996); see also *Unigard*, 983 P.2d at 1161 ("To establish actual prejudice, the insurer must demonstrate some concrete detriment, some specific advantage lost or disadvantage created, which has an identifiable prejudicial effect on the insurer's ability to evaluate, prepare or present its defenses to coverage or liability.").

*12 Industrial has never articulated any theory of prejudice in this action, nor has it proffered any evidence in support of such a defense. Instead, it points to the fact that Washington courts have, on occasion, found prejudice as a matter of law and suggests we do the same.^{N21} See, e.g., *Nw. Prosthetic v. Centennial Ins.*, 100 Wash.App. 546, 997 P.2d 972, 975-96 (Wash.Ct.App.2000); *Unigard*, 983 P.2d at 1163; see also *Twin City Fire Ins. Co. v. King County*, 749 F.Supp. 230, 233-34 (W.D.Wash.1990), *aff'd*, 942 F.2d 794 (9th Cir.1991) (unpublished). Such cases are not the norm, however—they are "extreme cases." *Pub. Util. Dist. No. 1*, 881 P.2d at 1029; *Pulse*, 566 P.2d at 579; see also *Pederson's Fryer Farms, Inc. v. Trans-america Ins. Co.*, 83 Wash.App. 432, 922 P.2d 126, 132 (Wash.Ct.App.1996) (recognizing that "Washington courts have found prejudice as a matter of law in only a few cases").

Moreover, even in these "extreme" cases the Washington courts engaged in a close evaluation of the specific injury alleged by the insurer, such as the loss of opportunity to mount a viable defense or the loss of opportunity to investigate a questionable claim against the insured, before concluding that prejudice existed as a matter of law. See *Nw. Prosthetic*, 997 P.2d at 973, 976 (finding prejudice

established as a matter of law where insured settled a debatable defamation claim before the insurer had a meaningful opportunity to investigate it, and the settlement was "achieved by parties who shared an interest in characterizing the \$325,000 payment as defamation damages," because that was the only claim covered under the policy); *Unigard*, 983 P.2d at 1161-63 (concluding insurer established prejudice as a matter of law where insurer lost the opportunity to mount the defense that its insured was not a strictly-liable "former operator" of contaminated site, which could have been based on insured's own statement that he had no "operations or involvement" in the site); see also *Tran*, 961 P.2d at 365-66 (finding actual prejudice as a matter of law where insured's refusal to provide financial documents containing material information not available from any other source prevented the insurer from being able to investigate the possibility that the insured's claim was fraudulent). Industrial has not asserted that any similar situation existed here.

Indeed, Washington has expressly refused to find prejudice as a matter of law in an environmental cleanup case where because of late notice the polluted property was investigated, assessed by experts, and completely remediated without the insurer's participation. *Pederson's Fryer Farms*, 922 P.2d at 130-32. The court in *Pederson's Fryer Farms* denied Trans-america's motion for directed verdict on the prejudice issue because "Transamerica fail[ed] to indicate how this delay hampered its ability to investigate, evaluate or defend against the State's assertion that Pederson's was required to remedy the contamination." *Id.* at 132. Moreover, "Pederson's did not deprive Transamerica of its right to control the litigation, as no action was filed against Pederson's." *Id.* Finally, the court rejected Transamerica's argument that it could have disputed Pederson's liability for the cleanup costs because there was no evidence even arguably falling within any of the narrow exceptions to the Model Toxic Act's strict liability provisions. *Id.* at 132-33. As in *Pederson's Fryer Farms*, there is no evidence in the record of this case suggesting Industrial could have taken any steps to mitigate or dispute Goodstein's liability for the pollution, or

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that Industrial was in any other way damaged by Goodstein's alleged breach.

*13 In sum, Industrial has in its motion for summary judgment fallen short of meeting its burden to warrant judgment as a matter of law on the duty to defend claim. It has failed to demonstrate that this is such an "extreme" case that the prejudice determination should not be decided by a jury, as it normally is under Washington law. Indeed, Industrial has failed to articulate any theory at all by which it could be said to have suffered actual and substantial prejudice due to Goodstein's alleged breach of its obligations under the policy. We therefore reverse the district court's grant of summary judgment for Industrial on the duty to defend claim, as Goodstein invoked the duty by filing this lawsuit for damages and Industrial has failed to establish that it was prejudiced as a matter of law by Goodstein's late notice of the claim. We emphasize that we express no view on the merits of the duty to defend cause of action, including whether there was a duty to defend at all on these facts and whether, if so, any damages were incurred for its breach.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

FN1 Appellee United States Fire Insurance Co_ is also a defendant in this suit, as it agreed to satisfy the obligations of Industrial under the insurance policies at issue here.

FN2. The Model Toxics Control Act of Washington, Wash. Rev.Code § 70.105D.040, "is designed to deal both with the remediation of former environmental hazards and to prevent environmental hazards in the future, [and] a past or present property owner is strictly liable for the remediation of environmental hazards caused by hazardous substances it released ... on its property." *Olds-Olympic, Inc. v. Commercial Union Ins. Co.*, 129 Wash.2d 464, 918 P.2d 923, 927

(Wash.1996).

FN3. Washington DOE regulations both allow voluntary remedial action by the property owner and authorize DOE-initiated remedial action. Wash. Admin. Code 173-340-510; *see also Olds Olympic*, 918 P.2d at 926 n. 4. This approach reflects the DOE's stated regulatory policy:

It is the responsibility of each and every liable person to conduct remedial action so that sites are cleaned up well and expeditiously where a release or threatened release of a hazardous substance requires remedial action. Potentially liable persons are encouraged to initiate discussions and negotiations with the department and the office of the attorney general that may lead to an agreement on the remedial action to be conducted with the state of Washington. The department may provide informal advice and assistance on the development of proposals for remedial action, as provided by WAC 173-340-515. Any approval by the department or the state of remedial action shall occur by one of the means described in subsections (2) and (3) of this section.

Wash. Admin. Code 173-340-510(1).

Subsection (2) of the DOE regulation identifies the two methods by which potentially liable persons may initiate remedial action: by consent decree under Wash. Admin. Code 173-340-520(1), or by requesting an agreed order under Wash. Admin. Code 173-340-530. An agreed order means the potentially liable person agrees to take specific steps to remediate the polluted site and the DOE agrees not to take enforcement action so long as the potentially liable person performs the necessary cleanup. Wash. Admin. Code 173-340-530(1).

Subsection (3) of the DOE regulation authorizes the DOE to initiate remedial action by: (1) "[i]ssuing a letter inviting negotiations on a consent decree under

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Wash. Admin. Code 173-340-520(2);" (2) "[r]equesting an agreed order under Wash. Admin. Code 173-340-530;" or (3) "[i]ssuing an enforcement order under Wash. Admin. Code 173-340-540."Wash. Admin. Code 173-340-510(3).

In addition to these cooperative approaches to cleaning up contaminated sites, the DOE retains the option of taking " appropriate remedial action on its own at any time."Wash. Admin.Code 173-340-510(4). The regulations also permit citizens to undertake, under certain circumstances, "independent remedial action[s]," i.e., cleanup efforts that are " without department oversight or approval and not under an order, agreed order or consent decree."Wash. Admin. Code 173-340-515(1).

FN4. The policies at issue contain identical language with respect to the terms at issue in this litigation. The citations are to Industrial policy no. MP 811-1439, the only policy actually included in the record.

FNS. For the purposes of the summary judgment motion, Industrial assumed that the Sternoffs received less money for the properties in their "as is" contaminated state than they would have had they first remediated the pollution.

FN6. On appeal, we "review de novo a grant of summary judgment and must determine whether, viewing the evidence in the light most favorable to the nonmoving party, there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law."Lopez v. Smith, 203 F.3d 1122, 1131 (9th Cir.2000) (en bane).

FN7. Although the Sternoffs argue that the district court simply ignored the cross-assignment evidence, the summary judgment order indicates otherwise. The district court noted the evidence but

explained that "this agreement was only mentioned briefly by Plaintiff and not in a way that put the substance or validity of this agreement properly before the Court for consideration."

FN8. Washington substantive law governs this dispute, which is predicated on diversity jurisdiction. See *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1556 (9th Cir.1991).

FN9. In support of his argument, Goodstein cites *Cable & Computer Technology Inc. v. Lockheed Sanders, Inc.*, 214 F.3d 1030 (9th Cir.2000). *Cable & Computer* is, as an initial matter, nonbinding authority, as it concerned California rather than Washington law. *Id* at 1033. Moreover, instead of helping Goodstein, the case simply highlights the deficiencies in the evidence submitted to the district court. *Cable & Computer* found the oral contract at issue to be a valid final agreement, rather than an unenforceable " naked agreement to agree," because the evidence submitted described the terms of the agreement and noted the amount of consideration paid. *Id* at 1035. Here, by contrast, the declaration is cursory and vague, and does not describe any consideration due under the agreement.

FN10. The Washington Supreme Court extended *Boeing's* holding in *Weyerhaeuser*, concluding that CGL policies cover environmental cleanup costs incurred by the insured even where no administrative agency has taken official adversarial action. *Weyerhaeuser*, 874 P.2d at 145.

FN11. The Industrial policy defines " property damage" as "physical injury to or destruction of tangible property" or "loss of use of tangible property."

FN12. The *Guelich* court cited *Prudential*

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Prop. & Cas. Ins.. Co. v Lawrence, 45 Wash.App. 111, 724 P.2d 418 (Wash.Ct.App. 1986), as persuasive authority. In *Prudential*, the court found a duty to defend in a view obstruction suit where the policy language did not include the limiting term "physics["; however, the court implied that a different policy by the same insurer requiring "physical injury" would not have created a duty to *defend*.

FN13. A contrary finding would essentially convert a liability policy to one that insures against a diminution in market value. *Bloch* 121 Cal.App.4th at 196, 17 Cal.Rptr.3d 13. Moreover, it would create perverse incentives for landowners to sell contaminated properties "as is" at fire sale prices and reap a windfall from their insurers under the guise of "diminution in market value" damages.

FN14. As an alternative argument, Goodstein also asserts that Industrial should be liable for coverage under a waiver and/or estoppel theory. In support of that proposition, Goodstein argues that Industrial was aware that Goodstein was filing a claim for coverage in his September 1990 letter but elected not to assert a reservation of rights or deny coverage. Goodstein makes no attempt to show that Industrial knew he was seeking to invoke coverage and made a conscious decision not to raise any defenses to coverage. See *Dombrosky v. Farmers Ins. Co. of Wash*, 84 Wash.App. 245, 928 P.2d 1127, 1134 (Wash.Ct.App.1996). Indeed, as Goodstein himself stated in his October 1990 letter that he did not understand the September 1990 letter to be a claim for coverage, he is ill-positioned to maintain that Industrial should have interpreted it as such. Further, Industrial's internal documents indicate only that it was preparing to assert defenses should Goodstein ever tender a claim for coverage, not that it considered that one

had already been made. For the same reason, Goodstein has not shown reasonable reliance on any representation, express or implied, by Industrial, a required element of equitable estoppel. *Id.*

FN15. To support their claim that the September 28, 1990 letter invoked a duty to defend, Goodstein points to the fact that he mailed a similar letter to other insurers and those insurers responded by sending Goodstein reservation of rights letters. There is nothing in the record, however, to suggest that those insurers also received letters similar to the October 20, 1990 letter sent to Industrial.

FN16. Industrial has stated specifically and repeatedly that it is not asserting a late notice defense. In its brief to this court, Industrial declared that it was not asserting late notice as a defense to coverage, it was moving to dismiss [the duty to defend claim] on the grounds that a defense was never requested. "Similarly, Industrial informed the district court that it "ha[d] not asserted late notice" as a defense to coverage in its summary judgment motion.

FN17. We note that the prejudice requirement is not limited to circumstances concerning late notice. Washington also, for instance, requires proof of prejudice where the insurer asserts as a defense to liability that the insured breached the policy's cooperation clause, which precludes coverage where the insured litigates or settled a lawsuit without involving the insurer. E.g., *Ore. Auto. Ins. Co. v. Salzberg*, 85 Wash.2d 372, 535 P.2d 816, 819 (Wash.1975); see also *Pederson's Fryer Farms, Inc. v. Transamerica Ins. Co.*, 83 Wash.App. 432, 922 P.2d 126, 131 (Wash.Ct.App.1996) (stating general rule that "[e]ven where an insured breaches the insurance contract, the insurer is not relieved of its duty to pay

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unless it can prove actual and substantial prejudice caused by the insured"). Industrial has not argued in this court that Goodstein breached the cooperation clause, nor has it put forth a theory of prejudice arising from such a breach. We therefore do not address the impact of the policy's cooperation clause. Should the issue be raised on remand, the district court may, of course, address it.

FN18. Industrial's argument is predicated on *Unigard's* statement that to invoke the duty to defend, "the insured must affirmatively inform the insurer that its participation is desired." 983 P.2d at 1160. Assuming that the filing of this lawsuit somehow failed to satisfy that standard, *Unigard* does not support the notion that Industrial can avoid liability without proving prejudice. After the quoted statement, the *Unigard* court went on to engage in prejudice analysis, *id* at 1161-63, which suggests that even if the insured does not affirmatively inform the insurer that a defense is desired, the insurer remains liable for the breach of the duty to defend absent proof of "actual and substantial prejudice." See *Enumclaw*, 153 Pad at 882.

FN19. Industrial has not argued in this court that the government's conduct related to the polluted properties did not constitute a "suit," and we therefore do not consider the issue here.

FN20. We note that even if Goodstein can show a breach of the duty to defend upon remand, he will not be able to recover as damages the amount by which the property value was depressed due to its polluted state. "[T]he well-accepted measure of damages for a good faith, but unjustified breach [of the duty to defend is] the costs and reasonable attorneys' fees incurred by the insured in defending itself plus consequential damages that the insured

incurred as a result of the breach." *Underwriters at Lloyds v. Denali Seafoods, Inc.*, 927 F.2d 459, 464 (9th Cir.1991) (applying Washington law). The discounted price Goodstein received for selling the land "as is" cannot possibly be considered to have been caused by Industrial's failure to defend. And, given our conclusion that Goodstein did not invoke the duty to defend until he filed this lawsuit, well after the sale of the polluted properties was completed, the decision to sell for a depressed price cannot be traced to any breach of the duty to defend either. Goodstein's diminution in value loss, then, did not come about as "a result of the breach" and is not recoverable as damages for the alleged breach of the duty to defend. See *id*

FN21. Washington state courts sometimes refer to the existence of a presumption of prejudice, citing *Felice v. St. Paul Fire & Marine Ins. Co.*, 42 Wash. App. 352, 711 P.2d 1066 (Wash.Ct.App.1985). See, e.g., *Pub. Util. Dist. No. 1*, 881 P.2d at 1029. However in *Felice*, the court did not merely presume prejudice but found actual prejudice, because the insured had already proceeded to trial before informing the insurance company. *Felice*, 711 P.2d at 1071 ("This actually prejudiced [the insurer] because it precluded the opportunity to evaluate the facts and determine whether a trial and expenses for an appeal were warranted.").

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